DOCUMENT RESUME

ED 448 650 HE 033 659

AUTHOR	Curtis, Pinsent
TITLE	Student Accommodation Projects: A Guide to PFI Contracts. Good Practice.
INSTITUTION	Higher Education Funding Council for England, Bristol.
SPONS AGENCY	Department for Education and Employment, London (England).
REPORT NO	HEFCE-00-47
PUB DATE	2000-10-00
NOTE	28p.
PUB TYPE	Guides - Non-Classroom (055)
EDRS PRICE	EDRS Price MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS	*College Housing; *Educational Facilities; Educational Finance; Financial Support; Foreign Countries; Higher Education; *Partnerships in Education; Program Development; Program Implementation
IDENTIFIERS	*England

ABSTRACT

This guide is intended for higher education institutions in England that are about to embark on student residential accommodation projects. It focuses on procurements under the Private Financial Initiative (PFI), a form of Public Private Partnership in the United Kingdom, but other approaches are considered. The guide draws on good practices from some arrangements that have already been made. The guide begins by setting out the background to PFI and then looks at the relationship between risk transfer and value for money. It examines how a PFU project might be structured and, where a PFI approach is not feasible, considers other approaches. The next section looks in more detail at risk transfer and value for money in relation to the principal risks inherent in a student accommodation project. Other sections examine the property issues involved, and at other issues related to student accommodation schemes. and at other issues that are specific to student accommodation schemes and which have arisen in the projects completed to date. Annex A considers guidance from a taskforce related to student accommodation projects, and Annex B lists some related guidance. (SLD)

Reproductions supplied by EDRS are the best that can be made
from the original document.

October 00/47 ED 448 650

Good practice

Student accommodation projects – a guide to PFI contracts

PERMISSION TO REPRODUCE AND DISSEMINATE THIS MATERIAL IN MICROFICHE AND IN ELECTRONIC MEDIA FOR ERIC COLLECTION SUBSCRIBERS ONLY HAS BEEN GRANTED BY

R. Kier

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

2A

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

☑ This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

HE033659

BEST COPY AVAILABLE

HIGHER EDUCATION hefce FUNDING COUNCIL FOR ENGLAND

Foreword

This guidance was prepared by Pinsent Curtis under contract to the Department for Education and Employment. It was developed from an examination of a limited number of signed Private Finance Initiative (PFI) contracts for student accommodation. The HEFCE is aware that a number of other contracts have been signed or are being negotiated under PFI or some other form of Public Private Partnership. We anticipate that we will be able to provide further advice in due course.

Student accommodation projects – a guide to PFI contracts

Contents

	Page
Foreword	
Executive summary	1
Introduction	2
Approaches to procurement	4
Risk allocation and value for money	7
Property issues	10
Specific issues	13
Annex A: Relationship to Taskforce Guidance	16
Annex B: Related guidance	23

Student accommodation projects – a guide to PFI contracts

To	Heads of HEFCE-funded higher education institutions Heads of universities in Northern Ireland
Of interest to those responsible for	Estates; Finance; Residential accommodation; Facilities management
Reference	00/**47**
Publication date	October 2000
Enquiries to	Tim Russell tel 0117 931 7468 e-mail t.russell@hefce.ac.uk

Executive summary

1. This guide is intended for Higher Education Institutions (HEIs) which are about to embark upon student accommodation projects. It focuses on procurements under the Private Finance Initiative (PFI), but other approaches are considered. It should be read in the light of the guidance set out in Annex B and, particularly, HEFCE 98/69 'Practical guide to PFI for higher education institutions (revised November 1998)' and 'Standardisation of PFI Contracts' (Treasury Taskforce/Butterworths 1999). The latter is referred to in this guide as the 'Taskforce Guidance'.

2. Recent experience of completed projects demonstrates that student accommodation is an area which is appropriate for PFI and other similar approaches. The purpose of this guide is to assist those undertaking similar projects. It is not intended to be prescriptive, but seeks to draw on good practice from some of the deals that have been signed already.

3. The guide starts by setting out the background to PFI and looks at the relationship between risk transfer and value for money. It then examines how a PFI project might be structured and, where a PFI approach is not feasible, considers other approaches. The next section looks in more detail at risk transfer and value for money in relation to the principal risks inherent in a student accommodation project. Following sections look at the property issues involved, and at other issues which are specific to student accommodation schemes, and which have arisen in the projects completed to date. Finally, Annex A considers the Taskforce Guidance in the context of student accommodation projects, and Annex B lists related guidance.

Introduction

PFI and the Public Private Partnership

4. PFI is a method of procurement which focuses on the delivery of a service, and not just acquiring an asset. It focuses on outputs rather than how they are delivered, and allocates risks to the party best able to manage them. Under the right circumstances, this transfer of risk can deliver better value for money than conventional procurement. PFI is one form of Public Private Partnership (PPP), which encompasses a wider set of relationships between the public and private sectors. The purpose of this document is to provide guidance on how to structure future projects. It is not intended to be prescriptive – each project should be treated on its merits.

Potential for PFI

5. Recent experience shows that student accommodation projects have clear potential for PFI. HEIs are therefore encouraged to consider PFI principles before embarking on procurement. Within the higher education sector a number of student accommodation PFI projects have been completed. The experience gained in these projects, together with the use of standard contracts, should assist in completing future projects, and should help to reduce costs and fees in those projects. The size of potential projects may not, however, always justify the use of a PFI structure, particularly ones that involve the private sector setting up a special purpose vehicle company. The commercial viability of any potential project will have to be considered on a case by case basis by the HEI, taking into account the scale of the project envisaged.

PFI and risk

6. PFI is about allocating risks to whichever party is best able to manage them, provided such arrangements represent value for money. Using the PFI, it has proved possible in almost all cases to allocate some of the risks of designing, building, operating and financing the asset to the private sector, on the basis that the private sector is better able to manage these risks. This approach differs considerably from the approach under an institutional full repairing and insuring (FRI) lease, where the bulk of the risk will lie with the tenant.[1]

7. Whether or not a PFI approach is adopted, it is recommended that a detailed analysis of the risks implicit in a project be undertaken at an early stage before the tender process is commenced. The major risks arising from a student accommodation project are discussed in paragraphs 23 - 37.

[1] A common approach to PFI accommodation projects is for the Contractor to grant a standard lease to the HEI but to disapply the tenant's covenants during the PFI period.

Experience to date

8. Student accommodation projects completed to date include:

- University of Greenwich – Avery Hill Student Village (October 1995 – 650 units)
- University of Brighton – Falmer Campus (September 1996 – 469 units)
- Falmouth College of Arts (December 1997 – 150 units).

The contracts for these projects form the basis of this guide. HEFCE has published a detailed case study of the Falmouth College of Arts project (HEFCE 98/71 'PFI case studies').

Applicable guidance

9. The advice in this document should be read in conjunction with the guidance listed in Annex B.

Terminology

10. In this guide, where a special purpose vehicle is set up to bid for a scheme, it is referred to as 'the SPV'. The private sector party pursuing a bid is referred to as 'the Contractor'.

Approaches to procurement

11. This section considers relevant factors in choosing a procurement route.

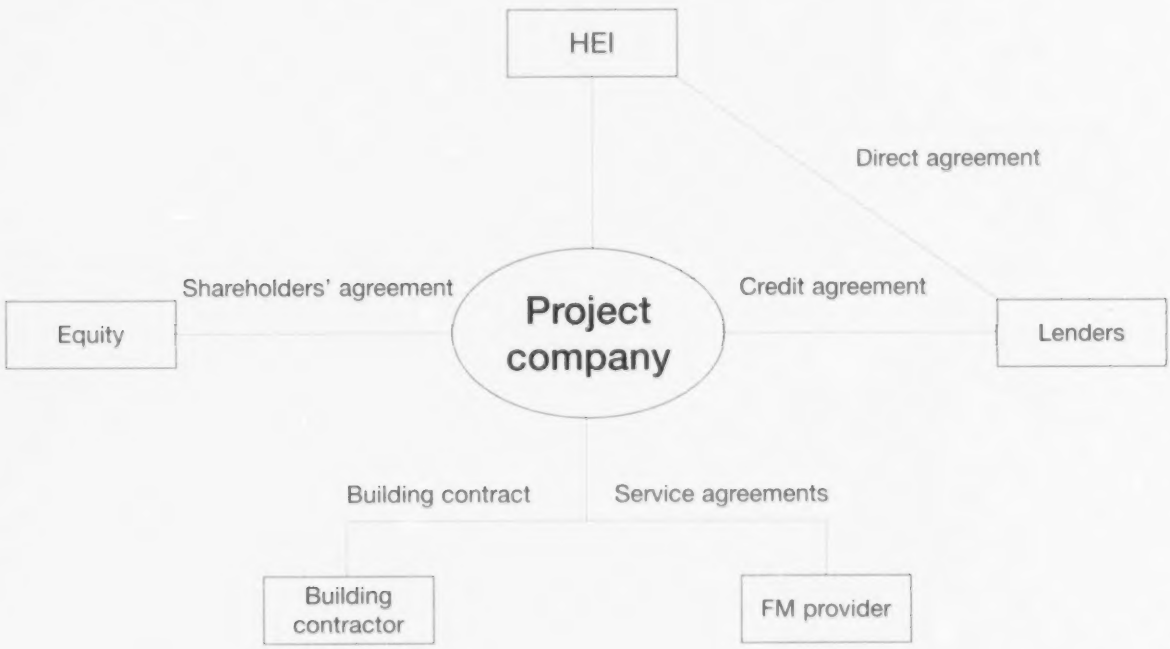
Private Finance Initiative

12. As noted above, the PFI is about allocating risks to the party best able to manage them, provided such allocation represents value for money. There are a variety of structures that could be explored in relation to PFI. In most sectors the prospective Contractor sets up a special purpose vehicle (SPV), normally a company, to undertake the project. However, there is no reason in principle why PFI schemes cannot be undertaken without the use of an SPV structure. Indeed, where the contracting party is a substantial entity in its own right, there may be advantages to an HEI in not using an SPV. This is the position on many of the student accommodation projects undertaken to date. Smaller schemes may not be suitable for an SPV approach; it is difficult to get project specific finance for such schemes because of the associated due diligence costs.[2]

SPV structures

13. The Contractor will set up an SPV to contract with the HEI and will take equity in the SPV. The SPV in turn will enter into contracts with a builder, one or more service providers, and funders (usually one or more lending banks). The funders will require certain rights against the HEI in relation to termination, and will want an agreement with the HEI on other areas such as the use of insurance proceeds. The Contractor will wish to ensure that all material risk undertaken by the SPV is passed down to subcontractors, since the SPV will have no assets other than the contracts to which it is a party. A typical SPV structure is illustrated in Figure 1 below:

Figure 1 – A typical SPV structure



2 HEFCE 98/71 page 14, paragraph 85. The project at Falmouth College of Arts developed without an SPV structure for this reason. Sanctuary Housing Association will initially fund the project out of its general reserves and will only seek third party funding when it has projects to add to the Falmouth College of Arts scheme.

14. The following points should be noted:

a. **Complexity.** SPV structures are complicated. They involve a large number of parties and documents. They can be difficult to negotiate. While standardisation is likely to change this to a degree, it will never be as simple as negotiating a building agreement and agreement for lease, or other non-SPV structure (see b below).

b. **Standardisation.** Various attempts have been made to simplify the PFI process. These can be seen in the 'Step by Step Guide' (see Annex B), which focuses on the PFI process, and in the Taskforce Guidance, which sets out commentary and drafting on key PFI issues. The advice in these documents should help to shorten the PFI process. The number of parties involved in a PFI deal means that PFI will never be as simple as other forms of procurement. However it can deliver compensating benefits in terms of value for money, risk transfer and affordability, which outweigh this complexity.

c. **Due diligence.** PFI tends to involve a more rigorous due diligence than other forms of procurement, driven on the Contractor's side by the requirements of funders. This means that the risks taken on by each party are better understood and the decision to proceed more robust. There is, however, no reason in principle why other forms of procurement should not benefit from a similar approach to due diligence. The strength of the HEI's covenant will be fundamental in determining whether a project proceeds.

Non-SPV structures

15. **Complexity.** As noted above, a non-SPV structure is likely to be simpler to put together than an SPV structure. Many of the student accommodation schemes undertaken to date have not used an SPV structure, for a variety of reasons.

16. **Bankability.** Non-SPV structures may require a contracting party which is willing to take the asset on its balance sheet, although this is not necessarily the case (for example, Falmouth College of Arts, where the asset is on the balance sheet of the college). Since such a party may seek to refinance the project at a later date, the approach to risk allocation set out in paragraphs 23 - 37 should be adhered to.

Other approaches

17. In certain cases neither type of PFI approach may be feasible for a student accommodation project. In such an event, a conventional approach may be adopted or a hybrid approach where a limited number of risks are transferred, falling short of the risk allocation position under PFI but going further than a conventional approach.

Conventional approach

18 Two variants are possible:

a. Where the HEI owns the land, a building contract with the HEI either:

- operating the new accommodation
- outsourcing the facilities management to a third party provider.

b. Where the Contractor owns the land, the HEI might enter into a full repairing and insuring (FRI) lease of the accommodation from the private sector and manage it itself.

Hybrid approach

19. This might feature:

a. A building contract. Payment on completion, as under a PFI contract, might replace stage payments.

b. An FRI lease. The Contractor might take on some of the operational obligations normally assumed by the tenant. This may, however, affect the marketability of the lease.

20. These approaches may not be viable in every case for an HEI, and are beyond the scope of this guidance.

Property issues

21. The appropriate approach will often depend on who owns the relevant site, and this is dealt with in the discussion on property issues in paragraphs 38 - 54.

Approaching the market

22. Before embarking on the procurement, HEIs should consider approaching the market informally in order to ascertain the likely level of interest for the project. In doing this, HEIs can gauge whether contractors are willing to build, finance and operate student accommodation, or whether they are keen to build and finance the projects only, as has been the experience in some cases. In approaching the market in this way, HEIs must ensure that no potential Contractor is given an unfair competitive advantage in breach of the EU procurement rules.

Risk allocation and value for money

Scope for risk transfer[3]

23. Following the model of other PFI projects, HEIs are encouraged to transfer the design, construction, management and operational risks of a student accommodation project to the private sector, where it is best value to do so. Significant advantages have resulted when the private sector focuses on whole life costs rather than just the construction costs of a building. Completed projects indicate that the services listed in paragraph 60 below are appropriate to be carried out by the private sector. Experience suggests that there is particular scope in a student accommodation PFI project to transfer the residual value risk of the asset to the private sector, and to build in a requirement for the private sector to achieve part of its return from third party income during vacations. Each of these elements is dealt with below.

Site acquisition and planning

24. Where the HEI does not own the intended site the Contractor should bear the risk of site acquisition (the Falmouth College of Arts case is an example). However, a project is likely to be easier to put together where the HEI has an available site.

25. It may be expedient for the risk of obtaining outline planning permission to remain with the HEI. Responsibility for obtaining full planning consent will rest with the Contractor whether or not the HEI has a site. Obtaining detailed planning consent is a major risk; the funder is likely to require such consent before proceeding to financial close.

Design and construction[4]

26. The design and construction risk has been taken by the private sector on every PFI project to date, and HEIs are encouraged to consider transferring it on future student accommodation projects. Key issues to consider include:

a. **The way in which the design is to be developed.** The Contractor will sign up to deliver the building to the HEI's output specification. This will need to contain all the relevant elements which the HEI wishes to define, such as which facilities need to be near or next to each other (sometimes referred to as 'adjacencies'), room layout, size, equipment, and finishes. However, the more the HEI wishes to retain control over the design itself, the more the design risk will remain with the HEI. The HEI's role following contract signature will be limited to reviewing the design in the context of the output specification.

b. **The level of control the HEI wishes to exercise over the build period.** It should be noted that a detailed monitoring role for the HEI is contrary to Taskforce Guidance (Annex A, paragraph 3). An HEI may take the view that it will be easier to avoid problems for the future if the HEI itself or a third party maintains a detailed monitoring role in respect of the building obligations, but this is likely to complicate risk transfer during the build period. An HEI seeking a high degree of monitoring should note that if it impedes the completion of the works, it would be expected to indemnify the Contractor in respect of the Contractor's losses (Annex A, paragraph 6). This may include compensation in respect of extra funding costs incurred by the Contractor.

c. **The achievement of the service commencement date.** Under a PFI contract, payment only starts once the building is operational. This provides the Contractor with a serious incentive to complete the construction on time. The HEI will wish to be sure, by way of inspections and performance tests, that the building meets the output specification in all respects. The contract will deal in detail with these elements.

d. **Delays to the service commencement date.** The HEI will be concerned to ensure that the service commencement date occurs in accordance with the contract programme. However, since the Contractor will not be paid until service

[3] HEFCE 98/69 paragraph 26 describes the scope for risk allocation in the higher education sector generally.
[4] Taskforce Guidance Section 3

commencement has occurred, no further incentive is likely to be required to ensure that service delivery is available on time. The contract will need to deal with delays to the service commencement date through no fault of the parties. The HEI may wish to oblige the Contractor to provide alternative accommodation, if the service commencement date is not achieved due to the default of the Contractor (paragraph 59).

Management and operating risk[5]

27. HEIs are encouraged to require that the Contractor bears the risk of managing and operating the facility on a day-to-day basis. The principal means of transferring management and operating risk is through the payment mechanism. This is likely to focus on the availability of the asset and the performance of the services to given standards set out in an output specification.

The output specification

28. PFI focuses not on how services are to be provided but on the outputs to be achieved. This is achieved by an output specification which defines the standards of service provision to be delivered. Output specifications have been developed for a wide variety of projects, although the quality is somewhat variable. While any specification developed for a particular project should be treated with care, it should be possible to find examples of output specifications as a starting point for future projects. It should not be necessary to 'reinvent the wheel' for this purpose. It is important that the service standards are set at the right level otherwise the performance required may not be affordable.

Payment mechanism

29. The payment mechanism determines what happens if the output specification is not achieved. If services are not provided to agreed standards then the payment mechanism should give the HEI the right to make deductions from the payments under the contract. In addition, if the accommodation is not available, for instance because the room is too cold or needs repairs to make it habitable, then further deductions will be made. One of the principal areas for negotiation in PFI projects is the relationship between the output specification and the payment mechanism. The Contractor will need to carry out due diligence on the likely level of deductions under the payment mechanism. HEIs are encouraged to adopt the 'no accommodation, no fee' principle. Other mechanisms are unlikely to transfer sufficient risk to the Contractor.

30. Operationally, the payment mechanism will be the most significant aspect of the PFI contract. The development of the output specifications and the associated payment mechanism is time-consuming, and needs to be started early.

Monitoring

31. The Contractor will be responsible for monitoring performance against the output specification, with the HEI carrying out audit checks. HEIs should consider whether a regime that looks at both availability and performance is suitable for their project or whether simpler forms of payment mechanism are sufficient, such as one which looks at availability alone.

Retained services

32. The HEI may wish to retain the right to market the facility as an integral part of student services. It may also wish to take the responsibility for collecting student rent. The HEI is likely to be in a better position to ensure the payment of rent than the Contractor in view of its relationship with the student, and this may determine who should be landlord.

Residual value risk

33. Unlike many facilities provided through PFI, student accommodation facilities may be available for other purposes at the end of the contract period. It may be possible to offset this residual value against the unitary charge (the periodic payment which the HEI makes to the Contractor). This will depend on the location of the facilities and the alternative demand for them.

[5] Taskforce Guidance Sections 7, 8, 9 and 10

Demand risk

Third party income

34. One feature of the student accommodation schemes which have completed to date is the existence of a third party income stream, derived from the provision of accommodation in the summer vacation to conferences or tourists. If this risk is to be allocated to the private sector, the potential of the scheme for creating such a stream will need to be more than speculative or it will not be bankable. HEIs need to consider in depth the market for such third party use and the costs associated with a shift to hotel-type services out of term time. Care should be taken in estimating the potential for such income.

Student throughput

35. It is unlikely to be cost effective to transfer the risk of filling vacant units to the Contractor unless there is a well developed market for the accommodation in question. Housing associations may wish to use the accommodation for social housing if they cannot let it to students, but this may be unacceptable to the HEI.

Risk and price

36. If PFI structures are followed, care should be taken as to the amount of risk allocated to the Contractor, as the more risk transferred the higher the price. Best practice suggests the early preparation of a risk matrix detailing the various risks implicit in the project and how they will be allocated.

Risk and accounting treatment

37. The amount of risk transferred will have a bearing on whether the asset is to be treated as an asset of the HEI for accounting purposes under FRS 5. HEIs will need to clarify what the balance sheet treatment will be.

Property issues

Land ownership

38. At the commencement of a project, land or buildings may already be owned by the HEI, which can be used for the accommodation project. The HEI might also wish to make available existing student accommodation to the Contractor, as part of the project. Alternatively the HEI might not have any facilities available, and this might require the Contractor to obtain suitable land or buildings for use in connection with the PFI project, if it did not have them already.

Lease, lease and leaseback, or concession

39. The land-holding structure will depend on two factors:

a. The land ownership issues outlined in paragraph 38.

b. Views as to which party to the transaction should best manage the relationship with students and staff of the HEI (see paragraph 53).

However, assuming that it is intended that the HEI is the most appropriate organisation to manage the relationship with the ultimate occupiers, the following scenarios will need to be considered.

Lease and leaseback: headlease

40. This position is relevant only where the HEI is the landowner of the property to be used within the project. In these circumstances, it is possible for the HEI to grant a headlease of the relevant site (with or without buildings) to the Contractor, on terms which will include the following:

a. **Term.** A period which will be not less than the proposed project period. It may be granted for a considerably longer period which may have a beneficial effect on residual value for the Contractor and which could beneficially affect the amount of unitary charge payable in any one year.

b. **Contractor's liabilities under the headlease.**

   i. Rent. Only a peppercorn or similar limited amount would be charged.

   ii. Outgoings. These would be the liability of the Contractor.

   iii. Insurance. This is most likely to be the liability of the tenant unless – because the buildings being used or constructed are connected to other buildings belonging to the HEI – it becomes difficult to deal with the risk of such insurance being taken by the Contractor over only part of the building.

   iv. Repairs and reinstatement. This should be the obligation of the Contractor.

   v. Provision of services. This should be the obligation of the Contractor.

   vi. Alienation. The Contractor may well only be permitted, at least during the project period, to assign or sublet the property in accordance with the terms of any project agreement entered into between the HEI and Contractor. What happens after the project period will depend on the length of the lease and the circumstances in which the lease and project agreement have terminated.

c. **Project period.** The terms will vary depending on whether the lease term ends at the same time. If the project agreement has terminated as a result of default, then it is likely that the headlease will be required to terminate at the same time. However, if the project comes to an end at the termination of the project period and the lease itself continues for longer, then the HEI may well require an option to terminate the lease – preferably at limited cost. If the Contractor considers there is residual value in the lease then it is likely to expect some payment to be made.

41. Before granting the headlease the HEI will allow the Contractor access to the land in order to construct the new facilities required. Such access is usually permitted by way of a non-exclusive licence, which will terminate when the headlease is granted at the start of service provision.

Underlease

42. The Contractor will grant an underlease back to the HEI. The area of the property used for this underlease may well be smaller, since the Contractor will remain liable for all maintenance and will, in effect, only be re-letting the interiors of those rooms, corridors, etc as are necessary to provide the actual accommodation for the occupiers. The term of the underlease will usually be the term of the project period, and it will automatically end either when the headlease ends or if the project fails during the project period. It may contain a right for the HEI to renew it in the event that the headlease is longer than the project period.

43. The tenant under the underlease (i.e. the HEI) will not assume any liability other than for deliberate damage, and it may be possible for this risk to be retained by the Contractor as a part of the overall insurance and management arrangements. This has been the case in some PFI schools projects. All liability for maintenance and payments will remain with the Contractor as tenant under the headlease and will otherwise be dealt with within the project agreement.

44. The underlease may contain options for the HEI to purchase the new facilities at certain points during the term at fixed prices. HEIs should consider whether such an approach offers value for money.

Concession

45. A concession is a form not often used in accommodation projects. However, it is always possible, where land is owned by the HEI, for the HEI to grant a concession to the Contractor. This will allow the Contractor to enter the HEI's land, construct (where appropriate) the necessary facility, and thereafter maintain it. The result for the Contractor is that it will have licence to occupy land in common with other users of that land, sufficient to enable it to carry out its obligations under the project agreement. No rights in land will be granted, no rents will be payable and there will be no liability for the Contractor at the end of the project period, other than anything which is residual liability under the project agreement itself.

Position where Contractor owns land

46. Here the Contractor will grant a lease to the HEI. Its terms should be broadly similar to the terms of the underlease set out in paragraphs 42 - 44. It will need to contain a right for the HEI to renew in the event that the project agreement is also renewed.

Security

47. There have been instances where the HEI owns land and has granted security to its own bankers over the freehold ownership of the land. More usually in private finance transactions, however, the Contractor will grant security to its own bankers over whatever interest in the land that the Contractor holds. The grant of security is most valuable where the headlease is for a longer period than the project period, since there is likely to be some residual value in such leases. Banks may be happy to manage without security over land, particularly where a concession-based approach has been taken. This is because they are more interested in the income stream than in the actual buildings which create that income stream.

Post-termination

48. Paragraphs 49 - 52 are only relevant where a project period has expired.

Land owned by HEI

49. Where a lease and leaseback structure has been used, and when the term of the headlease is the same as the project period, the parties are free to negotiate with each other for a renewal of the project. If such negotiations do not take place, or take place but fail, then the freehold land upon which the facility has been constructed will revert automatically to the HEI, either for no payment or a nominal payment. This is based on the principle that sufficient payment will have been made during the project period to reimburse the Contractor for the construction of any buildings used in the project.

50. Where a concession-based approach has been taken, this will also terminate automatically with no payment being made at all since the Contractor will have no interest in the land.

51. Where the headlease is for a longer period than the project period, then the HEI will need to decide what options it might want at the end of the term. There are a number of options for the HEI:

a. It may have the right to terminate the headlease, but at a price which reflects the fact there is a residual value in the land.

b. It may have the right to renegotiate a further project with the Contractor.

c. It may wish simply to leave the Contractor to utilise the buildings for its own purposes, subject to a use which is compatible with the surrounding area should the land be adjacent to existing facilities of the HEI.

In all these circumstances, the Contractor's interest in the land will end when the headlease ends.

Land owned by the Contractor

52. In these circumstances, if the HEI does not have or does not exercise an option to renew its contract with the Contractor, then the HEI must vacate the premises and the Contractor will be free to utilise those premises for its own purposes.

Relationships with tenants

53. It is usually considered that the HEI will be in the best position to grant occupation leases or licences to its students or staff in such a way that no security of tenure is created. That means that the occupiers can be asked to leave the premises at the end of each term or at the end of each academic year, without them having accrued any rights to stay on the property. In those circumstances it is unlikely that the Contractor will contract directly with the ultimate occupiers. However, it is open for them to do so, particularly where the accommodation takes the form of flats, rather than individual rooms. In these circumstances the Contractor will grant assured shorthold tenancies to the occupiers, enabling the relationship to be terminated after a specific period without the occupier having accrued any rights against the Contractor. The HEI may require nomination rights for the available space.

Creation of additional income

54. As part of the negotiations for the contractual relationship between the HEI and Contractor it may well be agreed that accommodation can be used out of term time either by the HEI or by the Contractor to create additional income. Any leasing documentation will need to take into account who has such rights, and therefore whether rights of occupancy for one or the other party may need to be put into suspension for those periods. If the HEI has the right to create additional income, then no changes will be needed to the leasehold documentation. If the Contractor has that right, then it will effectively be given a sub-licence to re-occupy certain areas during the times when additional income is being created.

Specific issues

55. This section considers those features which are likely to be unique to student accommodation projects, and which will need to be taken into account at the planning stage of the project. Examples have arisen in the projects signed so far.

Relationship with students

56. The precise legal structure may depend on the extent to which the HEI wishes to maintain a direct relationship with its students. The creation of the relationship of landlord and tenant between the HEI and students serves this purpose. If this is the case then the HEI will control lettings and market the facility itself, with the Contractor providing building management services. Such a position may suit the Contractor, since the HEI is likely to be in a better position to deal with non-payment of rent. It follows that, even where the Contractor becomes the students' landlord and manages lettings, the Contractor may want assistance from the HEI with regard to rent collection and seeking recompense for damage caused by students in the accommodation.

Demand risk

57. A related issue is who bears the demand risk. Two issues arise:

a. **Year on year demand risk.** Where there is a market for the accommodation, whether through social housing or private lettings, the Contractor may be prepared to take some of the demand risk, for instance, the risk of short-term fluctuations in demand.

b. **The longer-term desire of an HEI to increase or decrease its housing stock.** Any transfer of demand risk may lead to a decrease in available housing stock, on the basis that the contractor will seek to place third parties in the accommodation. They will be there at least on the basis of assured shorthold tenancies. As a minimum, the HEI is likely to require that a given number of units are available to it on the basis of first refusal. It follows that the HEI will be required to either nominate students to fill lettings within given timescales, or countenance the accommodation being let to third parties.

If the HEI is likely to want the accommodation to be available for use by its students in any event, it will probably not be appropriate to transfer the demand risk to the Contractor.

Academic year

58. The HEI should consider whether it requires the services for the whole of the academic year or just for a part of it. In some areas there may be significant demand for the services in the vacations for conferences and other lettings. This raises the possibility of transferring the vacation demand risk to the Contractor so that it relies to some extent on third party income to recover some of its costs. Where the potential of third party income is in doubt, it is unlikely to represent value for money to transfer such risk to Contractors. Hence, at Greenwich, the Contractor took the risk of summer lettings as there was a significant market but at Falmouth College of Arts the HEI took the risk. At Falmouth there was also a tax reason[6] for the HEI taking the risk.

Late delivery

59. Unlike office accommodation, the delivery of student accommodation to coincide with the start of an academic year[7] is likely to be essential. Failure will have particularly severe consequences since most student accommodation is let on an annual basis. The contract is likely to be prescriptive about when the HEI can accept delivery of the accommodation. At the very least it is also likely to provide that, where the Contractor is in default, the HEI can only be required to accept delivery during a vacation rather than term-time. Where the building is late, the contract should also provide for the Contractor to provide alternative accommodation within a prescribed distance of the site, and bear the cost of transport to and from the site. This position has been established on all the

6 See paragraphs 64 and 65, and HEFCE 98/71 page 11, paragraphs 49 and 50.

7 While the focus may be on the weekend before the start of the autumn term it should be noted that international students are likely to arrive earlier for induction.

schemes to date. In such a situation the contract will need to address how rent from students for such temporary accommodation is handled. Alternatively, students may occupy a part-complete development and be compensated in some way (by paying a lower rent, for example).

Services

Scope of service provision

60. The Contractor is likely to provide only a limited range of services as core services for a student accommodation project, although other services may be included on a case by case basis depending on how the Contractor views the potential uses of the accommodation. These services are listed below. The schemes concluded to date may be used as a starting point for developing the output specifications.

a. Building maintenance – hard facilities management (FM). The Contractor will supply building management services for the new facilities within the basic unitary charge. The inclusion of hard FM in this way is likely to deliver better value for money as it will make the Contractor focus on whole life costs.

b. Grounds maintenance. Grounds maintenance is provided as part of the services package on the schemes completed to date.

c. Waste management. Waste management may be included as part of a scheme where it delivers value for money.

d. Statutory compliance. Statutory compliance is largely part of building maintenance and will usually be dealt with in the building maintenance specification.

e. General management and caretaking. To the extent that they are not part of the building maintenance service, management services are a less significant part of the service. Where the HEI controls lettings and provides the primary point of contact for students, they may not be required as a Contractor service at all.

f. Security. Security features are likely to be an integral part of the design. However, the HEI will need to consider, on a case by case basis, whether it is better value for money to task the Contractor to provide security for an individual facility, or to make it part of the rest of the institution's security provision.

g. Cleaning. A cleaning service may be supplied in relation to common areas only, or in relation to each unit. Where the accommodation is self-catering the latter is less likely and the inclusion of a cleaning service may not represent value for money.

h. Energy management. Energy management has proved a particularly difficult risk to transfer to the Contractor under PFI schemes. This is especially true in self-contained student accommodation where the Contractor has little control over the amount of energy consumed by the tenants. Students will be concerned to see energy charges kept as low as possible, and energy efficiency will need to be taken into account as part of the design process.

i. Performance audit. In the first instance, the contract should provide for the Contractor to monitor its performance against the output specification. However, the HEI will wish to carry out periodic reviews of the Contractor's monitoring.

j. Parking and traffic control. Parking and traffic control may be provided as part of the project. This should be reviewed on a case by case basis.

k. Vacation letting. As noted above, vacation letting may be a service provided by the Contractor.

l. Catering. Catering is unlikely to be an integral part of most student accommodation projects unless the Contractor is providing fully serviced accommodation.

m. Housing management service. HEIs may wish to consider whether to include the general housing management service within the outsourced services. This might include providing information on types of accommodation and locations, and a pastoral service for accommodation needs. This will facilitate the Contractor's understanding and control of the market and may encourage the private sector to take the demand risk.

Part site issues

61. Where the student accommodation is delivered on land owned by the HEI, the relationship between the scheme and the way in which the HEI services its existing accommodation will need to be considered. In such a case the HEI will wish to explore whether the inclusion of whole-site facilities management delivers better value for money.

Employment

62. Where the Contractor will provide services which have hitherto been delivered by the HEI or some other agency, the application of the Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE) will need to be considered.

Tax

63. Tax is likely to be a significant issue in the structuring of any project. The principal areas will be as follows.

VAT

64. It will be essential to obtain VAT zero-rating treatment for construction costs of the accommodation. If VAT were charged on the construction costs, such VAT is likely to be irrecoverable because of the VAT exempt letting to students, and therefore a net cost of the project. For zero-rating to be available, the accommodation must be used for 'relevant residential purposes' and the appropriate certificate must be issued to the building contractor. A general issue here is the use of the accommodation for vacation non-student lettings (conference use, for example) which may not qualify as relevant residential purposes. It is understood that Customs and Excise have in the past taken a more flexible approach in relation to vacation lettings where they are made by the HEI itself, rather than by a private sector operator. It will be important to obtain specific clearance on this point in any particular case at an early stage in contract negotiations, to ensure that Customs and Excise's current approach is taken into account. HEIs should seek professional advice.

65. It will also be important to confirm the VAT status of the lettings to students, particularly if any element of services is provided with the letting. In order to avoid VAT being charged to students (which would represent a net cost to the project), it will generally be necessary to confirm with Customs and Excise the VAT status of the particular supplies made.

Private sector tax issues

66. The tax-efficient structuring of the SPV will generally be an issue for the private sector consortium partners and will not be discussed in detail here. The relevant issues will include the availability of capital allowances in respect of any capital expenditure, maximising interest relief on debt finance, and the tax treatment of any land or cash contribution made by the HEI or public sector to the SPV.

67. Issues which may affect the structure will include:

a. If cash or land contributions are to be made to the SPV, the SPV may wish these to be structured as capital contributions rather than payments of the unitary charge or concession fee. If this is an issue, it is likely that the SPV will wish the documentation to be signed off on this point by the Inland Revenue, which would need to be taken into account in the timetable. Note too that both the SPV and the HEI are subject to accounting standards, and their respective accounting treatments of the issue must be compatible.

b. Generally, the HEI will not be able to claim capital allowances on plant and machinery costs in the accommodation as the HEI will often be a non-taxpayer. The SPV may wish to structure the arrangements in relation to plant and machinery, either to ensure that it can obtain capital allowances itself, or that a third party lease financier can obtain these allowances. In order to permit the allowances to be claimed by the SPV or finance lessor in these circumstances, it is likely that they will have to have an interest in the land as required by the relevant legislation.

Annex A

Relationship to Taskforce Guidance

1. The purpose of this Annex is to comment on the Taskforce Guidance and its application to student accommodation projects. The Taskforce Guidance relates principally to the project agreement, which is generally the main document in a PFI project. It sets out how the facilities will be built and operated, and deals with all other aspects of the project. Most of the other documents will simply ensure that the risks transferred under the project agreement are passed down to subcontractors. HEIs are encouraged to explore solutions which offer value for money even where they do not reflect completely all the points set out in the Taskforce Guidance. The comments below are made in the light of experience from student accommodation schemes to date. **References to sections in this Annex refer to the Taskforce Guidance.** Words with initial capital letters have the meanings defined in the Taskforce Guidance.

Section 2: Duration of contract

2. One of the factors which may be relevant to the contract term is the possibility of the HEI having alternative uses for the assets, which might result in a significant residual value. This is something that HEIs may wish to explore further in the context of a student accommodation project.[8]

Section 3: Service commencement

3. As stated in the Taskforce Guidance, it is unlikely to be appropriate for an HEI to adopt the type of overseeing role it might traditionally expect to have when procuring stand-alone construction or development services.[9] Accommodation projects are likely to require a detailed treatment of critical dates given the need to ensure that new accommodation is available for the start of the academic year.[10]

Section 4: Protection against late service commencement

4. Late Service Commencement is likely to be a particular concern for HEIs. Failure to deliver the accommodation by the agreed date may mean that the HEI has nowhere to house students at the start of an academic year or term. This will have serious consequences for the HEI. As noted in paragraph 59 of the main text, the principal way of dealing with this is to make the Contractor take the risk of providing alternative accommodation, in the event of late service commencement due to the default of the Contractor. While this type of provision is common in contracts for student accommodation, an HEI is encouraged to consider whether it represents value for money before insisting on it.[11] A different way of approaching this issue may be to liquidate the cost of providing alternative accommodation.[12] HEIs are encouraged to specify the level of such damages early on in the bidding process in accordance with Taskforce Guidance.

Section 5: Delays

5. Section 5 of the Taskforce Guidance categorises the causes of delay as:

- Compensation Events, which are the HEI's risk and in respect of which the Contractor should be compensated
- Relief Events, which are best managed by the Contractor
- Force Majeure Events.

Commonly, Contractors will seek to add to the list of Relief Events and/or Events of Force Majeure on the basis that they are unable to manage the risk in question. HEIs adopting this categorisation should consider whether the allocation of risk implicit in the categorisation in fact delivers value for money for the project. There may be cases where an event described as a Relief Event should be categorised as a Compensation Event where this delivers value for money to the HEI. It is suggested that HEIs explore this with Contractors at an early stage in the bidding process, starting from the assumption that the categorisation in the Taskforce Guidance should be followed.

8 Section 2.2.2
9 Section 3.1.4
10 Section 3.3
11 Section 4.1.3
12 Section 4.2

Compensation Events

6. In determining the list of Compensation Events, the obligations of the HEI should be considered, since failure to perform these obligations by the HEI may give rise to losses on the part of the Contractor which will need compensating. For instance, in a student accommodation project, the HEI may be asked to look after rent shortfalls and the failure to do so will cause loss to the Contractor. In addition, the activities of its staff and/or third parties may impede the Contractor and/or damage its equipment, giving rise to loss. The Taskforce Guidance restricts Compensation Events to the construction period but, in view of the factors above, there may be a case for having Compensation Events extend into the service period.[13] The manner in which the compensation is calculated will need to be addressed. The suggestion in the Taskforce Guidance is to treat capital expenditure and revenue expenditure differently, but it will need to be shown that this delivers value for money.

Relief Events

7. As noted above, Relief Events are events in respect of which the Contractor is preserved from termination but which it otherwise has to manage. There may be other events to be added to the list. Some events on the list may be better treated as Compensation Events in appropriate circumstances (such as power failures or strikes by HEI staff).

8. The Taskforce Guidance provides that the duration of the contract should not be extended because of the occurrence of a Relief Event.[14] HEIs should only adopt a different approach if it offers compelling benefits in value for money.

9. The relationship between Relief Events and insurance should be considered in all cases. To the extent that the Contractor can insure against an event, it should not be entitled to compensation. However, the test of how an event is treated should be who is best able to manage the risk and whether the transfer of that risk delivers value for money.

Section 6: Information warranties

10. In line with Taskforce Guidance, HEIs are encouraged to provide what assistance they can to facilitate the Contractor's due diligence. HEIs should consider establishing a data room early in a project for this purpose. Where the HEI is the sole source of information, the HEI should consider warranting it to the Contractor. This is likely to reduce the cost of due diligence and consequently the price the HEI will pay.[15]

Section 7: Service requirements and availability

11. HEIs should consider adopting the principle of 'no accommodation, no fee' if they consider this delivers value for money. Availability-based payment mechanisms would appear from experience to be appropriate for student accommodation projects. HEIs should consider which outputs of the soft services it is appropriate to include in the definition of availability, such as basic levels of cleanliness.

12. Special consideration needs to be given to the mechanics of any availability regime. As the accommodation is likely to be self-contained, it will need to be determined how instances of unavailability, not already identified by the Contractor, are communicated to the Contractor. The Contractor may require this to be through an authorised person, but it is likely to be more convenient to the HEI if students have some means of notifying this to a single point of contact or helpdesk.

13. Contractors may be able to avoid the consequences of unavailability by providing alternative accommodation. This may be a real possibility in the case of student accommodation and should be considered carefully by HEIs. In such a case, availability payments will continue in full or in part, depending on the standard and location of the alternative that is offered.

Section 8: Maintenance

14. HEIs may wish to look carefully at any sinking fund provisions. While in general it is recommended that HEIs do not acquire any rights over the sinking

13 Section 5.2.1.5
14 Section 5.3.3.2
15 Section 6.3

fund, there may be exceptions where this appropriate. There may also be cases where the HEI is asked to hold the sinking fund for tax reasons. Depending on what is to happen at the end of the contract period, the HEI may want the contract to deal with the condition of the asset at the end of the contract period. The best way of dealing with this is by requiring the asset to remain in a defined condition and, if the HEI suspects it is not, to give it self-help rights where the contractor does not carry out the works required following a survey.[16] Surveys on completion are dealt with in Section 22 of the Taskforce Guidance.

Section 9: Performance monitoring

15. The negotiated performance regime will form a key element of the risk allocation mechanism. The Contractor will reflect it in pricing the contract, and it will not deliver value for money unless it is set at the right level.

16. HEIs will wish to consider how soon the performance monitoring starts. As a general rule, performance monitoring should start on the service commencement date. However, in certain limited cases it may be appropriate to allow a settling-in period of three to six months at the start of service delivery.[17] Whether this is appropriate will depend on the nature of the services being provided and, with regard to facilities maintenance, who owns the facilities at the end of the term. HEIs should ensure that any deferment of performance monitoring will deliver value for money.

17. The Taskforce Guidance states that it is not appropriate to alter the performance regime in the case of the replacement of subcontractors. HEIs may, however, wish to consider this in individual cases where this appears to lead to better value for money.

18. Monitoring is likely to be carried out by the Contractor in student accommodation schemes. An HEI will wish to consider who will monitor the Contractor's monitoring and how it is to be carried out. PFI projects raise resource issues in the operational phase which need to be addressed at an early stage. It is likely to be appropriate to allow users to report failures, but this should be discussed with the Contractor. It is desirable that payment mechanisms and monitoring arrangements are kept as simple as possible.

19. The use of a performance point system may be appropriate for student accommodation projects. Like the calibration of the level of deductions, it will be important that any termination threshold is set carefully so as to transfer an appropriate level of risk to the Contractor. The award of performance points should be based on objective criteria according to the level of seriousness of the default in question.

20. The use of ratchet mechanisms, under which deductions or performance points increase over time, should be considered carefully. Ratchet mechanisms allocate more risk to the Contractor. The Contractor will reflect this in the contract price, and the result may not deliver value for money.[18]

Section 10: Price and payment mechanism

21. As noted in the Taskforce Guidance, the payment mechanism is the heart of the contract and the principal means of allocating risk. HEIs are encouraged to adopt the key principles set out in Section 10. HEIs may wish on occasion to commit to a basic level of use in the payment mechanism on the basis of value for money. There may be occasions where it is appropriate to transfer usage risk in relation to student accommodation to the Contractor, for instance, when there is a market for the accommodation beyond the HEI. However, HEIs should be careful where they seek to transfer such risk to ensure that this represents value for money. Usage risk can take a number of different approaches, including the ability for the HEI to step down its requirements over the contract period.

22. The Taskforce Guidance recommends the use of one of two payment mechanism models, Models A and B. The principal difference between the models is that one relates to individual places and the other to broad accommodation areas. HEIs will

[16] Section 8.5
[17] Section 9.4
[18] Section 9.11.4ff

wish to consider which of these two models to follow. HEIs are encouraged to adopt payment mechanisms which include the outputs of hard facilities management in the definition of availability. The extent to which other services are wrapped into the definition of availability will depend on whether this delivers value for money.[19]

23. The Taskforce Guidance states that the payment mechanism should not 'ring-fence' or guarantee the Contractor's finance charges as this is unlikely to deliver good value for money. While the Taskforce Guidance takes the view that unitary charge systems based on Model A are bankable, the degree of risk transfer implicit in this model may not be achievable in every area, and HEIs should not have closed minds on the issue.

Section 11: Payments and set-off

24. HEIs are encouraged to adopt the principles set out in Section 11.

Section 12: Change in Service

25. Change mechanisms are important in the context of long-term relationships, and HEIs are encouraged to include them where they enter into contracts of this type. It is expected that an HEI may wish to prescribe what changes are mandatory and how the costs of such a change are to be dealt with. As noted in the Taskforce Guidance,[20] it may be very difficult to accommodate changes in the period up to service commencement. A wider right to impose changes in this period is unlikely to deliver value for money. The principles in Section 12 should where possible be incorporated in any contract.

Section 13: Change in law

26. As noted in the Taskforce Guidance, the issue of change in law should be considered in the context of indexation, benchmarking and market testing. Given the nature of a student accommodation facility and the possibility of alternative uses, it may be inappropriate to provide for change of law at all. It will be the Contractor's duty to comply with all law regardless of when the law was passed or whether its provisions are foreseeable, because the relevant costs will be picked up through indexation and benchmarking. HEIs, in particular, have little influence over legislation; the private sector generally bears the risk of change in law in the ordinary contracts it enters into, and is accustomed to managing such risks.

27. It follows from the above that HEIs should consider carefully who bears the risk of Specific Changes in Law and General Changes in Law. In many cases it will be appropriate that these are the Contractor's risk. Whether Discriminatory Changes in Law should be an HEI risk will also need to be considered, but transferring this to the Contractor may not deliver value for money.

Section 14: Price variations

28. As noted in the commentary on Section 13 above, the contract should set out the correct relationship between change in law, indexation, benchmarking and market testing. Given the position outlined in relation to change in law, HEIs may wish to consider the extent to which it is appropriate to rely solely on indexation, benchmarking and market testing. They should bear in mind that benchmarking or market testing hard facilities management may not deliver value for money, as it will remove the focus away from whole-life costs.

29. Indexation is likely to be based on RPI or some other indexation factor. Formulae which lead to RPI – x are likely to lead to the Contractor building in a contingency.

30. Benchmarking may not be appropriate in all cases. Indexation alone may suffice. If benchmarking is included, some form of sharing mechanism will be needed. HEIs choosing not to include a benchmarking mechanism for soft services should consider whether this approach will still deliver value for money.

31. HEIs may prefer market testing to benchmarking due to the inexact nature of

[19] Section 10.4.3
[20] Section 12.2.2

benchmarking, but they should note that market testing is likely to be more disruptive. The Taskforce Guidance states that market testing should generally only be undertaken after a benchmarking exercise has been completed.[21] However, the precise nature of the treatment of price variations is one for the HEI to determine.

32. The Taskforce Guidance also deals with refinancing.[22] The view is taken that a contracting authority (in this case the HEI) should only seek to benefit from a refinancing in limited circumstances. HEIs are encouraged to adopt this approach.

Section 15: Sub-contracts and employees

33. The Taskforce Guidance discourages attempts by HEIs to control sub-contractors, or employees of the Contractor or sub-contractors. HEIs are encouraged to follow this approach. In the case of a student accommodation project there are unlikely to be any issues of public interest or national security which may require the HEI to exercise control. In any event, any criteria should be reasonable.

Section 16: Assignment

34. HEIs are encouraged to follow the approach in the Taskforce Guidance.

Section 17: Change in ownership

35. HEIs are encouraged to follow the approach in the Taskforce Guidance. There are unlikely to be any exceptions to the general rule that allows free transfer of shares in the Contractor after the Service Commencement Date.[23]

Section 18: Termination

36. HEIs should consider the consequences of all types of termination. Termination clauses should address more than material breach and insolvency. To the extent that compensation is payable on termination, this will depend on what options apply at the end of the term and whether the assets have any alternative use. In some cases student accommodation is likely to have a clear alternative use and may remain with the Contractor on termination. This is considered in more detail in paragraphs 40 - 47 of this Annex.

Section 19: Termination on expiry of service period

37. The Taskforce Guidance distinguishes between contracts for services requiring assets for which there is no practical alternative use and contracts for services requiring assets which have an alternative use. Student accommodation facilities could fall under both headings depending on their location and nature, although they would appear to have a greater potential than many types of asset to fall under the second heading. In relation to student accommodation it may therefore be possible to pass on to the Contractor some residual value risk and this should be investigated on each project. Where this is the case the HEI will pay a lower unitary charge, which is not large enough for the Contractor to recover all the cost of its investment over the life of the contract. However, residual value should only be allocated to the Contractor where it delivers value for money to the HEI.

38. Where the asset has an alternative use and the Contractor is persuaded to take some residual value risk, the options for the HEI at the end of the term will be:

- to take over the asset, in which case a payment should be made to the Contractor based on market value
- to re-tender the service, in which case the successful Contractor in the re-tendering exercise should make a payment to the previous Contractor reflecting the value of the assets
- if the HEI has no further use for the asset, to walk away at no further cost leaving the Contractor to realise the asset's value.

39. HEIs are encouraged to adopt this approach. The position where there is no alternative use is dealt with in the Taskforce Guidance and should be referred to there.

21 Section 14.5.2
22 Section 14.6
23 Section 17.4

Section 20: Early termination

40. The Taskforce Guidance advises that the contract should deal with early termination in a comprehensive fashion. However, as noted above, the amount of compensation will depend on the degree to which the residual value risk has been transferred. The Taskforce Guidance is written on the assumption that the relevant asset has no alternative use and therefore no residual value. However, HEIs should note the statement in Section 21.6 that 'in certain scenarios... residual value could distort the effect of any compensation payment and reduce the incentives to perform that would otherwise exist'.

41. For student accommodation projects, HEIs are encouraged to explore first the position that there is an alternative use and therefore a residual value. Even where the new facilities are in the middle of an HEI campus, it will be possible for the Contractor to let the facilities directly to students without the HEI underwriting payment. If it is not possible then the assumptions behind the Taskforce Guidance should be explored. The following points should be noted.

HEI default

42. Compensation should put the Contractor in no worse a position than if the contract had proceeded as expected. If it will be possible for the Contractor to realise the same income stream from the facility then no compensation will be payable. However this will rarely be the case. A more realistic basis is the net present value (NPV) of the difference between the value of the facility let and any usage guarantee offered by the HEI. Whether it is necessary to explore the issues set out in the Taskforce Guidance should be discussed with bidders at an early stage.

Contractor default

43. HEIs will wish to consider carefully which events of default by the Contractor can lead to termination. In view of the discussion above, it may not be appropriate to include rights to terminate in respect of the issues set out in Sections 15 to 17 of the Taskforce Guidance. HEIs may also want to consider whether they need to be able to terminate for persistent breach. As noted in the Taskforce Guidance, a well drafted performance regime avoids the need for this.

44. There is no standard basis for determining compensation on Contractor default termination. To the extent that the asset has an alternative use it may be appropriate that no compensation is paid at all. This will encourage the lenders to resolve any relevant issues. If there is no alternative use, HEIs are encouraged to adopt the market value approach set out in the Taskforce Guidance.[24]

Force Majeure

45. As noted above, the contract will define the range of Force Majeure events. Any compensation on Force Majeure needs to take into account the residual value of the asset. If a senior debt approach is adopted it will need to be less than the value of the asset.

Corrupt gifts and fraud

46. HEIs will want to consider whether they need to have the right to terminate for corrupt gifts. If the asset has an alternative use the basis of compensation may be at odds with the approach to compensation in the remainder of the contract.

Voluntary termination

47. Voluntary termination of a student accommodation scheme should be dealt with in the same way as HEI default.

Section 21: Calculation and payment of early termination payments

48. HEIs are encouraged to observe the principles set out in this section of the Taskforce Guidance.

Section 22: Surveys on expiry and termination

49. If the assets have a residual value (as has been assumed above) then a survey will only be needed to value the assets where the HEI wishes to acquire

[24] Section 20.2.6

the asset (see Section 21 of the Taskforce Guidance).

Section 23: Indemnities, guarantees and contractual claims

50. HEIs are encouraged to observe the principles set out in Section 23.

Section 24: Insurance

51. In a student accommodation project, it will be the Contractor's responsibility to arrange insurance for the facilities, and the Contractor should be left to manage the insurance arrangements as far as possible. HEIs are encouraged to observe the principles set out in Section 24.

Section 25: Information and confidentiality

52. HEIs are encouraged to observe the principles set out in Section 25.

Section 26: Intellectual property rights (IPR)

53. HEIs are encouraged to observe the principles set out in Section 26.

Section 27: Dispute resolution

54. HEIs are encouraged to observe the principles set out in Section 27.

Section 28: Authority step-in

55. HEIs are encouraged to consider including rights of step-in in their contracts. Any such rights should reflect the principles of Section 28.

Section 29: Boilerplate

56. HEIs are encouraged to observe the principles set out in Section 29.

Section 30: Direct agreement

57. See Section 30 of the Taskforce Guidance.

Annex B

Related guidance

HEFCE publications

98/69 Practical guide to PFI for higher education institutions (revised November 1998).

98/71 PFI case studies.

99/43 PFI case study.

Treasury Taskforce publications

Standardisation of PFI Contracts (the 'Taskforce Guidance').

A Step-by-Step Guide to the PFI Procurement Process (Revised November 1999).

Technical Note No. 2 – How to Follow EC Procurement Procedure and Advertise in the OJEC.

Technical Note No. 3 – How to Appoint and Manage Advisers to PFI Projects.

Technical Note No. 4 – How to Appoint and Work with a Preferred Bidder.

Policy Statement No. 4 – PFI Projects: Disclosure of Information and Consultation with Staff and Other Interested Parties.

Higher Education Funding Council for England
Northavon House
Coldharbour Lane
BRISTOL
BS16 1QD

tel 0117 931 7317
fax 0117 931 7203
www.hefce.ac.uk